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No. 96-519

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAMPTON TREE FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States was barred from enforcing contracting officers' decisions that were final, conclusive, and no longer subject to appeal under the Contract Disputes Act, because it did not assert the underlying merits of its contract claims as compulsory counterclaims in an earlier suit brought by the contractor seeking declaratory relief and an injunction under the Administrative Procedure Act.

2. Whether the United States' enforcement action was timely under 28 U.S.C. 2415(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 82 F.3d 1468. The opinion of the district court dismissing several of the government's claims as untimely (Pet. App. 28-50) is unreported. The opinion of the district court dismissing the government's remaining claims as barred by *res judicata* (Pet. App. 51-68) is reported at 860 F. Supp. 741.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1996. A petition for rehearing was denied on July 10, 1996. Pet. App. 70-71. The petition for a writ of certiorari was filed on October 1, 1996. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Contract Disputes Act (CDA or Act), 41 U.S.C. 601 *et seq.*, the United States may take legal action on a covered contract claim only after procuring a decision on the claim from a designated contracting officer. 41 U.S.C. 605(a); see *Sharman Co.* v. *United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). If the United States obtains a contracting officer's decision asserting a claim against a contractor, that decision is "final and conclusive and not subject to review by any forum, tribunal, or government agency, unless an appeal or suit is timely commenced as authorized [under the CDA]." 41 U.S.C. 605(b).

A contractor may obtain *de novo* review of a contracting officer's decision (i) by appealing it, within 90 days of receipt, to the applicable agency board of contract appeals (41 U.S.C. 606),[1] or (ii) by filing suit challenging the decision, within 12 months of receipt, in the United States Court of Federal Claims (41 U.S.C. 609(a)(1) and (3)). If unsuccessful before the board of contract appeals or the Court of Federal Claims, the contractor may appeal the matter further to the United States Court of Appeals for the Federal Circuit. 41 U.S.C. 607(g)(1); 28 U.S.C. 1295(a)(3) and (10).

2.a. Between October 18, 1978, and January 8, 1982, the Forest Service awarded petitioner 11 contracts to harvest timber in the Siuslaw National Forest, lo-

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[1] Decisions by the Forest Service's contracting officers are appealed to the Department of Agriculture's Board of Contract Appeals. 7 C.F.R. 24.4.

cated in Oregon. Each of the contracts was subject to the CDA, and each specified a termination date by which petitioner was obliged to cut, remove, and pay for the timber included in the sale. If petitioner failed to perform a contract by that date, the Forest Service was entitled to declare petitioner in default and to terminate the contract. Pet. App. 4-5.

Petitioner failed to complete any of the contracts by its termination date. Between March 1986 and April 1987, the Forest Service notified petitioner that all of the contracts were in default, and submitted a claim respecting each contract to a contracting officer. Between July 1987 and May 1988, the contracting officers issued "Final Decisions" setting forth the damages owed by petitioner on each contract. Pet. App. 4-7.

b. Several years earlier, when declining timber prices created hardship for timber companies, the Forest Service had adopted a MultiSale Extension Policy (MSEP), which afforded participating timber companies an additional five years to perform their contractual obligations. See 48 Fed. Reg. 54,812 (1983). In return, the participating companies forfeited their rights to additional extensions, and agreed to certain contract modifications. Each company that wished to participate was required to submit its MSEP plan to the Forest Service no later than February 15, 1984. Pet. App. 7.

Petitioner chose not to submit MSEP plans by the February 15, 1984 deadline, electing instead to rely on an injunction issued on that date by the United States District Court for the District of Oregon in a class-action suit brought by and on behalf of timber company contractors, who sought to rescind their contracts on grounds of commercial impracticability.

Pet. App. 7. On February 20, 1985, however, the Ninth Circuit vacated the district court's injunction, having concluded that the district court lacked jurisdiction to entertain the plaintiffs' contract claims. *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, cert. denied, 474 U.S. 919 (1985). Because of delays associated with the plaintiffs' unsuccessful petitions for rehearing and certiorari, the Ninth Circuit's mandate did not reach the district court until December 2, 1985. In the interim, on May 9, 1985, petitioner finally filed its MSEP plans. The Forest Service rejected those submissions as untimely. Pet. App. 7-8.[2]

3.a. On June 24, 1985, petitioner filed suit in United States District Court for the District of Oregon seeking declaratory and injunctive relief requiring the Forest Service to accept its MSEP plans. Petitioner argued that its MSEP filings were timely notwithstanding its failure to comply with the regulatory deadline, because the filings had been made while the *North Side* injunction was still in effect. The government moved to dismiss petitioner's complaint, arguing that, under *North Side*, the district court lacked jurisdiction to afford petitioner contractual relief. Pet. App. 8-9.

On April 20, 1987, the district court ruled that it had jurisdiction over petitioner's complaint, and ordered the Forest Service to accept petitioner's MSEP

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[2] The Forest Service agreed to settlements with many members of *North Side*'s plaintiff class, permitting those who settled four-year extensions on contracts for which the original term had expired prior to December 31, 1984, and five-year extensions on contracts which expired after that date. Petitioner chose not to settle. Pet. App. 8.

plans. *Hampton Tree Farms, Inc.* v. *Block*, No. 85-1085-BU, 1987 WL 115596 (D. Ore.). The court reasoned that petitioner's filings were timely because the pendency of the *North Side* injunction tolled the regulatory deadline, and the Forest Service acted arbitrarily in refusing to accept petitioner's filings while at the same time accepting late filings from applicants who had entered into post-*North Side* settlements. Pet. App. 9, 54-55. On May 11, 1987, the government filed a motion to alter judgment under Rule 59(e) of the Federal Rules of Civil Procedure.

On April 7, 1988, after petitioner had received all but one of the contracting officers' decisions and while the government's Rule 59(e) motion was pending, petitioner filed its First Amended and Supplemental Complaint for Declaratory and Injunctive Relief. That complaint sought, among other things, a declaration (1) that petitioner was entitled to have its 11 contracts extended in accordance with the MSEP; (2) that the government had wrongfully refused to extend the contracts; (3) that the government had wrongfully terminated the contracts; (4) that petitioner had not defaulted on any of the contracts; and (5) that the government had breached the contracts. Pet. App. 55. On October 30, 1989, petitioner supplemented that filing, adding an allegation that contracting officers had by then issued final decisions claiming damages for petitioner's default on all 11 contracts. *Id.* at 56.

On March 19, 1990, the district court denied the government's Rule 59(e) motion and granted petitioner's renewed motion for summary judgment. The court ruled, *inter alia*, that petitioner was entitled to have its contracts extended, that petitioner was not in default on any of the contracts, and that the govern-

ment had breached the contracts by terminating them. Pet. App. 57.

b. On February 14, 1992, the Ninth Circuit reversed. *Hampton Tree Farms, Inc.* v. *Yeutter*, 956 F.2d 869.[3] The court held that, because the district court lacked jurisdiction when it issued the injunction in *North Side*, the injunction was void *ab initio*, and petitioner's mistaken reliance upon it vested in petitioner no enforceable right to file its MSEP plans beyond the regulatory deadline. 956 F.2d at 871. The court of appeals also held that the Forest Service's rejection of petitioner's untimely filed MSEP plans was neither arbitrary nor capricious. *Id.* at 872. Petitioner tendered a petition for a writ of certiorari, which this Court denied on October 5, 1992. *Hampton Tree Farms, Inc.* v. *Madigan*, 506 U.S. 816.

4. Petitioner had not placed sole reliance, however, on its district court action for declaratory and injunctive relief. After receiving the contracting officers' decisions claiming damages for its defaults on the contracts, petitioner filed separate actions in the Court of Federal Claims challenging each decision[4].

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[3] Over the years, the name of this case changed as the Secretaries of Agriculture changed—from John R. Block to Richard E. Lyng to Clayton K. Yeutter, while the case was in the district court; Clayton K. Yeutter while it was in the Court of Appeals for the Ninth Circuit; and Edward R. Madigan when it was before this Court on petition for a writ of certiorari. For simplicity's sake, we refer to this matter in the text uniformly as the *Yeutter* case.

[4] The Court of Federal Claims was known at that time as the United States Claims Court. It was renamed the United States Court of Federal Claims as part of the Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516. To avoid confusion, we refer to the tribunal uniformly as the Court of Federal Claims.

On May 3, 1988, the government moved to dismiss, arguing that 28 U.S.C. 1500 deprived the Court of Federal Claims of jurisdiction because the claim that petitioner sought to pursue there (that it was not liable to the Forest Service under the contracts at issue) was essentially the same claim that petitioner was pursuing simultaneously in the *Yeutter* litigation.[5] On July 14, 1988, at petitioner's request, the Court of Federal Claims stayed its proceedings pending a decision by the district court in *Yeutter*. After the district court's decision in *Yeutter*, the Court of Federal Claims extended its stay pending the outcome of the government's appeal to the Ninth Circuit. Pet. App. 9-10, 56-57.

At the time of the government's motion to dismiss, "[t]he scope and meaning of section 1500 was * * * a matter of some uncertainty and controversy." Pet. App. 11. On May 24, 1993, this Court issued its opinion in *Keene Corp.* v. *United States*, 508 U.S. 200, which clarified that, like its statutory predecessor, Section 1500 deprives the Court of Federal Claims of jurisdiction over a claim whenever there is pending before another court a claim against the United States "based on substantially the same operative

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[5] Section 1500 of Title 28 provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

facts * * *, at least if there [i]s some overlap in the relief requested." 508 U.S. at 212.

On July 14, 1993, the Court of Federal Claims entered judgment dismissing for lack of subject matter jurisdiction each of petitioner's 11 complaints. Pet. App. 11.

5.a. On August 2, 1993, after petitioner's actions in the Court of Federal Claims had been dismissed, the government initiated this action in the United States District Court for the District of Oregon, filing a Complaint on Claim for a Debt seeking judgment for damages on each of the defaulted contracts. Pet. App. 12, 34. The government asserted that, since petitioner failed timely to invoke the jurisdiction of a tribunal authorized to hear its appeal of the contracting officers' decisions, those decisions had, under 41 U.S.C. 605(b), become "final and conclusive and not subject to review by any forum." As a consequence, the government contended that it was entitled to judgment on the contracting officers' decisions without litigation on the merits.

The district court rejected the government's arguments and granted petitioner's successive motions for summary judgment. The court concluded that the bulk of the government's claims were time-barred (Pet. App. 51-68), and that the government's remaining claims were barred by *res judicata*, because it failed to assert its present claims as counterclaims for damages in the *Yeutter* litigation (Pet. App. 28-50).

b. The court of appeals reversed. Pet. App. 1-27. First, it rejected the district court's conclusion that the government's suit was barred by *res judicata*. The court of appeals observed that Congress restricted the methods for challenging contracting

officers' decisions to appeals before boards of contract appeals or suits in the Court of Federal Claims in order "to confine these government contract disputes to expert tribunals created expressly for that purpose." Pet. App. 13. Because the Federal Rules of Civil Procedure do not "expand the jurisdiction of the district courts," or "create jurisdiction where none exists," the court concluded that "the compulsory counterclaim provision of Rule 13(a) cannot compel the government to litigate the merits of its contract claims in the district court." Pet. App. 13-14.

The court agreed with the government, moreover, that this action is not one to litigate the contract claims on the merits, but rather an action to enforce contracting officers' decisions that were, by the time of the court's decision, final and unappealable. Pet. App. 14 (citing 41 U.S.C. 605(b)). It rejected petitioner's argument that the government should have attempted to enforce the contracting officers' decisions by filing compulsory counterclaims in the *Yeutter* case. The court explained that, because all of the contracting officers' decisions were already the subject of suits in the Court of Federal Claims, or were still susceptible to such suits, at the time the government filed its answers to the supplemental pleadings in *Yeutter*, "the finality of the contracting officers' decisions [had] not yet [been] established," and any attempt to enforce those decisions would have been premature. Pet. App. 15.

The court of appeals also rejected the district court's conclusion that the government's action was

barred by the applicable statute of limitations, 28 U.S.C. 2415.[6] Observing that the United States is precluded by 41 U.S.C. 605(a) from taking legal action on a contract claim until that claim has been subject to a contracting officer's decision, the court held that the government's right of action does not accrue (and the time for filing an enforcement action does not begin to run) until the issuance of a contracting officer's decision. Pet. App. 17. The claims respecting nine of petitioner's eleven contracts were timely, under that interpretation, because the United States filed suit on those contracts within six years of the date of the corresponding contracting officers' decisions. Pet. App. 19. The government's claims respecting the other two contracts were also timely, the court held, because the United States filed suit on those contracts within one year of the final decision in the applicable administrative proceedings—the dismissal of petitioner's suits in the Court of Federal Claims. Pet. App. 19-21.

Judge Noonan dissented. Pet. App. 24-27. In his view, notwithstanding Congress's provision of specialized fora for litigation of CDA claims and the fact that the contracting officers' decisions were not yet final at the time, the government was required by Rule 13(a) of the Federal Rules of Civil Procedure to

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[6] Section 2415(a) provides in pertinent part:

> [E]very action for money damages brought by the United States * * * which is founded upon contract * * * shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

litigate the merits of its contract claims in district court by asserting counterclaims for damages in the *Yeutter* litigation.

ARGUMENT

1. Petitioner argues (Pet. 8-14) that the government's suit to enforce the decisions of its contracting officers is barred by *res judicata*, because the government failed to litigate the merits of the contract claims as counterclaims in the *Yeutter* litigation. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

The CDA establishes a comprehensive and largely exclusive framework for resolution of most government contract disputes. See *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 78 (D.C. Cir. 1985). Pursuant to the CDA, the government was not permitted to take legal action on its contract claims against petitioner without first making them "the subject of a decision by the contracting officer." 41 U.S.C. 605(a). Once the contracting officers' decisions issued, they were "final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit [wa]s timely commenced as authorized by [the CDA]." 41 U.S.C. 605(b).

Although petitioner contends that the government was somehow obliged to raise and litigate the merits of the contracting officers' decisions by filing counterclaims in the *Yeutter* case, from the government's standpoint there were at that time no merits issues left to resolve. Once the contracting officers issued decisions finding petitioner in default and

setting out the damages that petitioner owed on the contracts, those decisions were "final and conclusive" absent a successful appeal by petitioner to a board of contract appeals or the Court of Federal Claims. Aside from defending the contracting officers' decisions in the event of a timely challenge, the government had nothing further to do as a prerequisite to enforcement.

The court of appeals correctly recognized (Pet. App. 13), moreover, that forcing the government to litigate the merits of its contract claims in district court would defeat Congress's intent through the CDA to confine the adjudication of government contract disputes to the two expert tribunals created specifically for that purpose. In effect, petitioner argues that a contractor presented with an adverse decision by a contracting officer has three options: (i) it can appeal to the appropriate board of contract appeals; (ii) it can file suit in the Court of Federal Claims; *or* (iii) it can file a complaint seeking declaratory relief in a district court, and thereby oblige the United States to litigate the merits of the contracting officer's decision in that forum. If Congress had intended to permit district court review, it could easily, and far more simply, have so provided. Instead, in enacting the CDA, it expressly withdrew from the district courts the jurisdiction they had previously exercised over contract claims not exceeding $10,000. See 28 U.S.C. 1346(a)(2).

Notwithstanding Congress's determination not to vest jurisdiction over CDA contract disputes in the district courts, petitioner argues that, since it was properly in district court seeking declaratory relief on the contracts against the United States, the district court had jurisdiction over the government's

claims respecting those contracts by virtue of Rule 13(a) of the Federal Rules of Civil Procedure. That is incorrect for two reasons.

First, although the court of appeals did not reach the issue, the district court had no jurisdiction over petitioner's claim for declaratory relief for the same reasons that the court lacked such jurisdiction in *North Side*. Second, even if the district court had had jurisdiction under the Administrative Procedure Act to entertain petitioner's request for declaratory relief, petitioner can point to no statutory grant of jurisdiction authorizing the district court to adjudicate the merits of the contracting officers' decisions. Contrary to petitioner's suggestion, Rule 13(a) does not itself confer subject matter jurisdiction over compulsory counterclaims. Rather, it is "intended to require joinder of only those claims that might otherwise be brought separately." *Chemehuevi Indian Tribe* v. *California State Board of Equalization*, 757 F.2d 1047, 1053 (9th Cir.), rev'd on other grounds, 474 U.S. 9 (1985) (per curiam). See generally Fed. R. Civ. P. 82 (The Federal Rules of Civil Procedure cannot be construed to "extend or limit the jurisdiction of the United States district courts or the venue of actions therein."); *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941) (The Federal Rules of Civil Procedure do not purport to create jurisdiction where none exists.).

The cases cited by petitioner (Pet. 9-12), at most, stand for the proposition that the CDA does not impose any limitation on jurisdiction conferred expressly by another statute (other than the Tucker Act). See *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569 (Fed. Cir. 1995) (Chapter 11 of Bankruptcy Code); *In re Remington Rand Corp.*, 836 F.2d 825 (3d

Cir. 1988) (same); *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370, 1377 (11th Cir. 1991), (Suits in Admiralty Act and the Maritime Lien Act); *In re Liberty Constr.*, 9 F.3d 800 (9th Cir. 1993) ("sue and be sued" provision of Small Business Act); *Wright* v. *United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994) (sue and be sued provision of Postal Reorganization Act). We believe that those decisions gave too little weight to Congress's intent through the CDA to centralize government contract disputes in the boards of contract appeals and the Court of Federal Claims. But even assuming that those cases were correctly decided, the ability to litigate a contract dispute in district court pursuant to an independent grant of subject matter jurisdiction does not suggest a right to litigate a contract dispute in district court in the absence of a statute conferring such jurisdiction. It is one thing to aver that the jurisdictional limitations of the CDA may be overridden in certain limited classes of cases by jurisdiction specifically conferred by another statute, and quite another to contend (as petitioner does) that, by filing a declaratory judgment action, a contractor may always force the government to litigate the merits of its contracting officers' decisions in district court.

2. Petitioner argues (Pet. 14-17) that, even if the government could not be compelled to litigate the merits of the contracting officers' decisions in district court, it was required by Rule 13(a) to enforce the contracting officers' decisions through compulsory counterclaims in the *Yeutter* litigation, and its failure to do so bars the government from seeking to enforce its right to damages in the present case. That argument is without merit.

a. Although the district courts unquestionably have authority to enforce contracting officers' decisions, the Ninth Circuit correctly concluded that the government was not required to assert its present enforcement claims as compulsory counterclaims in the *Yeutter* litigation because enforcement at that time would have been premature. Pet. App. 15. At the time the United States filed its answers to petitioner's supplemental pleadings in *Yeutter*, certain of the contracting officers' decisions were already subject to suit by petitioner in the Court of Federal Claims. The commencement of those suits in the Court of Federal Claims rendered the contracting officers' decisions nonfinal (41 U.S.C. 605(b)) and therefore unenforceable in district court. The remaining contractors' decisions were, at the time, still susceptible to suit in the Court of Federal Claims, because the one-year period in which to bring such suits under 41 U.S.C. 609(a)(1) had not yet expired. Petitioner eventually filed timely actions in the Court of Federal Claims challenging those decisions as well. It was, therefore, not until July 14, 1993, when the Court of Federal Claims dismissed petitioner's suits, that the United States was finally able to bring an enforcement action in district court.[7] By that time, however, the *Yeutter* case had long since concluded.

b. Petitioner argues (Pet 17-18) that the government should have filed counterclaims in the district

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[7] Although the government might theoretically have filed counterclaims in *Yeutter* to enforce those contracting officers' decisions that petitioner had not yet appealed to the Court of Federal Claims, that would have been pointless, as petitioner's eventual appeal of each such decision aptly demonstrated.

court notwithstanding the pendency of petitioner's suits in the Court of Federal Claims, in light of the later determination by the Court of Federal Claims that, under 28 U.S.C. 1500, it had no jurisdiction to address petitioner's complaints. The court of appeals correctly rejected that argument.

When petitioner filed suit challenging the contracting officers' decisions in the Court of Federal Claims, the government promptly moved to dismiss under Section 1500, in light of the pendency of the *Yeutter* litigation. Petitioner, however, sought and received successive stays, which postponed the resolution of the government's motion to dismiss for more than five years. During that period, with the merits of its motion to dismiss unresolved, "the United States as a practical matter could not enforce the contracting officers' decisions: on the face of [CDA § 605(b)], those decisions were not 'final' because a suit had been timely commenced and was pending in the Court of Federal Claims." Pet. App. 22-23. By the time the Court of Federal Claims addressed and granted the government's motion to dismiss, in light of *Keene*, the *Yeutter* litigation was over. In these circumstances, the court below correctly concluded that the government committed no procedural default.

3. Petitioner argues (Pet. 18-19) that the six-year statute of limitations contained in 28 U.S.C. 2415 began to run on the dates when the Forest Service notified Hampton that it was in default of its contracts, not, as the court of appeals held, on the dates when the contracting officers issued their final decisions on the contracts. Petitioner relies principally (Pet. 19) on *United States* v. *Gavilan Joint Community College*, 849 F.2d 1246 (9th Cir. 1988), and other cases that involved contracts not subject to the CDA, which

held that, as a general matter, a cause of action accrues on a contract when a party becomes aware of a breach thereof. Those cases are inapposite.

Under Section 2415, the United States must bring a suit for money damages founded upon a contract "within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later." 28 U.S.C. 2415(a). Because the government may not take legal action on a contract subject to the CDA unless and until the government's claim has been "the subject of a decision by a contracting officer," 41 U.S.C. 605(a), the government's right of action on such a claim does not accrue upon its awareness of the contractor's breach, but instead upon the issuance of the contracting officer's decision. 41 U.S.C. 605(a); *Sharman Co.* v. *United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993) ("Under the CDA, a final decision by the contracting officer on a claim, whether asserted by the contractor or the Government, is a 'jurisdictional prerequisite' to further legal action thereon."); *United States* v. *International Ass'n of Firefighters*, 716 F. Supp. 656, 659 (D.D.C. 1989) ("No cause of action generally accrues until the plaintiff has a right to enforce his cause, and in this case the United States had no right to enforce its cause until the February 4, 1983 letter [comprising the contracting officer's decision] had been sent."); cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 511 (1967) (action against government accrues under 28 U.S.C.

2401 only upon completion of required administrative process).[8]

4. Finally, petitioner takes issue (Pet. 21-23) with the court of appeals' holding that the two government actions brought more than six years after the applicable contracting officers' decisions were nonetheless timely because they were commenced within one year after the completion of the proceedings in the Court of Federal Claims. In petitioner's view, Court of Federal Claims suits challenging contracting officers' decisions are not the sort of "administrative proceedings" that trigger the alternative one-year statute of limitations under Section 2415(a). The court of appeals correctly rejected that view.

In 1966, when Section 2415 was first enacted, contractors sought review of contracting officers' decisions before an appropriate board of contract appeals, with a right of appeal to the Court of Claims, an Article III tribunal. The proceedings before boards of contract appeals (which not infrequently took more than six years from the date of the contracting officers' decisions) were unquestionably "administrative proceedings" that triggered application of the alternative one-year statute of limitations.

The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, created in place of the Court of Claims the Court of Federal Claims (an Article I court), and permitted contractors under the CDA to

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[8] Petitioner's contrary reliance on *Remington Rand*, 836 F.2d 825 (3d Cir. 1988), is misplaced. That case held only that the government may have a "claim" within the meaning of Section 101(4) of the Bankruptcy Code for which it is required to a proof of claim in a Chapter 11 proceeding before it possesses, by virtue of a contracting officer's decision, a cause of action on that "claim." *Id.* at 826-832.

challenge contracting officers' decisions either before a board of contract appeals or in the Court of Federal Claims. The court of appeals correctly concluded that there is no reason to treat the parallel avenues of review[9] differently for purposes of Section 2415(a): "'[A]pplicable administrative proceedings required by contract or law' must now be read to include a suit in the Court of Federal Claims challenging a decision of a contracting officer." Pet. App. 20. Accord *United States* v. *General Electronics*, 556 F. Supp. 801 (D.N.J. 1983).[10]

As the Ninth Circuit observed (Pet. App. 20-21), because proceedings in the Court of Federal Claims can at times be lengthy, a failure to apply the alternative one-year statute of limitations in cases involving such proceedings would in some cases result in the expiration of the government's time to bring an enforcement action "before it has a final decision to enforce." The facts of this case illustrate the

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[9] There is little distinction between the two review options. A board of contract appeals "is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Federal Claims." 41 U.S.C. 607(d). When two or more related actions involving the same claimant are pending before a board of contract appeals and the Court of Federal Claims, they may be consolidated in either forum. 41 U.S.C. 609(d). And contractors have a right of appeal from either forum to the Federal Circuit. 28 U.S.C. 1295(a)(3) and (10); 41 U.S.C. 607(g)(1).

[10] Petitioner's reliance (Pet. 22) on *United States* v. *Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980), is unavailing. That case predated the Federal Courts Improvement Act of 1982, and it held only that an appeal to the Court of Claims (an Article III court) from the decision of a board of contract appeals was not a continuation of the administrative proceeding for the purposes of Section 2415(a).

problem. The Forest Service issued contracting officers' decisions on two of the contracts at issue by April 1987. Petitioner filed timely suits challenging both decisions in the Court of Federal Claims. After years of delay—occasioned by petitioner's repeated motions for stays—the Court of Federal Claims dismissed petitioner's suits on July 14, 1993. By that time, more than six years had elapsed from the dates on which the contracting officers' decisions were issued. If petitioner's suits in the Court of Federal Claims were not considered "administrative proceedings" for purposes of Section 2415(a), the United States would have been unable to enforce its contractual rights through no fault of its own.[11] That could not have been Congress's intent.

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[11] Petitioner asserts (Pet. 22-23) that, because the Court of Federal Claims lacked jurisdiction to entertain its claims, the pendency of its suits in the Court of Federal Claims could not have operated to toll the statute of limitations. That is not correct. Petitioner's commencement of those suits rendered the contracting officers' decisions nonfinal. 41 U.S.C. 605(b). During the pendency of the suits, therefore, the United States was unable to proceed with any enforcement action. Cf. *United States* v. *BLH, Inc.*, 773 F.2d 232 (8th Cir. 1985) (staying government's enforcement action pending resolution of suit by contractor in Court of Federal Claims).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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